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DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-884

In the Supreme Court of the United States

OCTOBER TERM, 1985

R. BANKS, ET AL., PETITIONERS

v.

PAN AMERICAN WORLD AIRWAYS, INC. AND ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the Civil Aeronautics Board abused its discretion in denying a claim for prejudgment interest on an award made in an arbitration proceeding under labor protective provisions imposed by the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 763 F.2d 1399. The order of the Civil Aeronautics Board (CAB) (excerpts at Pet. App. 13-22) is reported at 103 C.A.B. 520. The CAB order denying reconsideration (Pet. App. 7-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1985. The petition for a writ of certiorari was filed on September 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1]The CAB's duties and responsibilities were transferred to the Department of Transportation at the end of 1984 under the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* and the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 *et seq.* Accordingly, the appropriate federal respondent has been substituted in place of the CAB. See Sup. Ct. R. 40.3.

STATUTE INVOLVED

Prior to its amendment in 1978, Section 401(j) of the Federal Aviation Act of 1958 (the Act), Pub. L. No. 85-726, 72 Stat. 756 (current version at 49 U.S.C. App. 1371(j)) provided as follows:

> No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Prior to its amendment in 1978, Section 412 of the Act (72 Stat. 770) (current version at 49 U.S.C. App. 1382) provided as follows:

> (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, and or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

> (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Prior to its amendment in 1978, Section 416(b)(1) of the Act (72 Stat. 771) (current version at 49 U.S.C. App. 1386(b)(1)) provided as follows:

> The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

STATEMENT

1. In 1975, the Civil Aeronautics Board (CAB or Board) approved a large-scale international route exchange between Pan American World Airways (Pan American) and Trans

World Airlines in order to alleviate the two carriers' severe financial problems. *Pan Am-TWA, Route Restructuring Agreement*, 66 C.A.B. 1654 (1975). This action was taken under the CAB's authority to approve agreements among air carriers (§ 412), its authority to approve carrier suspensions of service (§ 401(j)), and its power to exempt carrier route changes from the Act's certificate authority requirement (§ 416(b)(2)). The Board conditioned its approval on the two carriers' acceptance of the Board's standard labor protective provisions (LPPs).[2] *Pan Am-TWA, Route Restructuring Agreement*, 67 C.A.B. 1327 (1975). Although the LPPs did not bar either carrier from dismissing employees, Section 4(a) of the LPPs required each carrier to pay allowances to employees dismissed because of the route exchange. Section 12 of the LPPs provided that disputes over dismissal allowance claims would be resolved by arbitration.

In 1976 and 1977, Pan American furloughed 418 flight engineers, almost all of whom claimed dismissal allowances. After Pan American denied their claims, the matter proceeded to lengthy arbitration. At the end of that process an arbitrator ruled that only 171 flight engineers lost their jobs as a result of the route exchange and were entitled to dismissal benefits. In subsequent proceedings, the arbitrator identified the claimants eligible for the payments. Petitioners, who were among the successful claimants, then asked the arbitrator to rule that Pan American was obligated to pay interest on their claims from the dates of dismissal. The arbitrator ruled that he had no authority to award interest on the flight engineers' claims, for his authority was limited to the scope of Section 4 of the LPPs and that section did not authorize an award of interest.

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[2]These standard LPPs were developed by the Board in airline merger and acquisition cases decided under Section 408 of the Act (72 Stat. 767) (current version at 49 U.S.C. App. 1378).

2. On review, the Board held that petitioners were not entitled to an award of interest.[3] As the Board pointed out (Pet. App. 15), "the LPPs by their terms do not require a carrier to pay prejudgment interest." The Board also noted that it "would have expressly said so" if it had intended "to impose as substantial a requirement" as an obligation to pay interest (*id.* at 16). Accordingly, imposing such an obligation on Pan American would constitute a retroactive amendment of the LPPs, a step the Board considered unfair (*id.* at 18-19), since Pan American had no notice until several years after the route exchange that any claimant would demand such interest. The record, moreover, contained "no signs" that Pan American had tried unreasonably to delay the completion of the arbitration (*ibid.*).

The Board also found that the denial of the interest claim was consistent with judicial practice, for courts do not automatically award prejudgment interest, particularly when, as here, the claims were unliquidated. The Board recognized that the National Labor Relations Board (NLRB) includes interest in back pay awards. However, those awards, unlike LPP payments, compensate employees for violations of federal law. In any event, the NLRB's practice is not binding on other agencies (Pet. App. 11-12, 20).

3. The court of appeals affirmed. It held that the award of prejudgment interest was a legal question within the Board's competency and that the Board's denial of interest was not arbitrary or capricious: "The Board correctly noted that the LPPs on their face do not provide for an

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[3]Petitioners also asked the Board to impose sanctions on Pan American for wi[illegible] delaying the arbitration and the payment of any allowances. The [illegible]ard concluded that petitioners had failed to show that Pan American had unreasonably delayed the proceeding. Pet. App. 21-22 & n.14.

award of interest, and that no statute or judicial decision mandates such an award" (Pet. App. 5). The court also agreed with the Board's conclusion that the NLRB's decisions did not create binding precedent (*ibid.*). While recognizing that Pan American had benefitted from the use of the allowance monies during the arbitration proceeding, the court affirmed the Board's conclusion that an interest award was not appropriate, since the Board had found that Pan American had not unreasonably delayed payment of the dismissal allowances (*id.* at 6).

ARGUMENT

The decision of the court of appeals affirming the Board's interpretation of the LPPs is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review by this Court is not warranted.

1. The Board and the court of appeals agreed that the LPPs by their terms do not require the payment of prejudgment interest on dismissal allowances (Pet. App. 5, 16), a conclusion not challenged by petitioners (Pet. 9). Neither the Fifth Amendment nor any federal statute or common law rule requires an award of prejudgment interest on a damage award when there is no other express legal entitlement to such interest. Instead, in cases analogous to this one, "[the] general rule is that in the absence of a statutory provision the award of prejudgment interest is in the discretion of the court." *Oil, Chemical & Atomic Workers Int'l Union* v. *American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977). Accord, *Taylor* v. *Philips Industries, Inc*, 593 F.2d 783, 787 (7th Cir. 1979); *Lodges 743 & 1746, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976), citing *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962).

The court of appeals properly deferred to the Board's interpretation of the LPP program. The Board has the primary responsibility for interpreting the LPPs, for it developed the LPPs and "has the best understanding of what

those provisions are supposed to mean." *Wallace* v. *CAB*, 755 F.2d 861, 865 (11th Cir. 1985). Accordingly, the interpretation of the agency that drafted and administers the LPP standards is due "a high degree of deference." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 557 (1980).

2. The question whether the Board abused its broad discretion in this particular case does not, of course, warrant this Court's review. In any event, petitioners have failed to show that the Board exercised its discretion arbitrarily or irrationally. As shown, there is no general requirement that prejudgment interest be paid on claims created by federal law.[4] Petitioners' challenge to the Board's interpretation is grounded in large part on the misconception that Pan American breached a contractual obligation by failing to pay allowances to the claimants until several years after their dismissal (Pet. 11-12). The LPPs, however, entitled Pan American to an arbitration of its defense that few, if any, flight engineers were entitled to dismissal allowances. By finding that most claimants did not have valid claims for allowances, the arbitrator established that Pan American's initial refusal to pay was not unjustified.

3. Petitioners contend (Pet. 13-14) that the NLRB's policy of awarding interest in back pay cases and the Board's lack of an independent labor policy mandated the award of prejudgment interest here. This contention lacks merit. The NLRB's policy was not binding on the CAB — indeed, the courts do not consider themselves obligated to follow the NLRB's prejudgment interest policy in cases arising under other federal labor statutes. *Lodges 743 & 1747, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d at

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[4]The Board found that Pan American had not unreasonably delayed the resolution of the flight engineers' dismissal allowance claims, a finding that petitioners did not challenge in the court of appeals. The start of the arbitration hearings, moreover, was delayed for 19 months by the parties' agreement. See Pet. App. 12.

446 (footnote omitted) ("no sound reason" exists why the courts should "rigidly adopt the identical remedies employed by the NLRB on actions involving unfair labor practices"); *De Arroyo* v. *Sindicato De Trabajadores Packinghouse*, 425 F.2d 281, 290 (1st Cir. 1970); *Oil, Chemical & Atomic Workers Int'l Union* v. *American Cyanamid Co.*, 546 F.2d 1144 (5th Cir. 1977).

Petitioners' argument ignores the fact that the Board's LPPs are based on its transportation responsibilities, not on a national labor policy. As the court of appeals noted (Pet. App. 5), "the CAB's major concern is the regulation of the airline industry, not the promotion of any specific labor policy." See also *Kent* v. *CAB*, 204 F.2d 263, 265 (2d Cir. 1953); *Air Line Employees Ass'n* v. *CAB*, 413 F.2d 1092, 1094-1095 (D.C. Cir. 1969).[5]

4. No other court has ever ruled on an employee's entitlement to interest on LPP benefits, so there is no conflict among the circuits. The alleged conflict cited by petitioners (Pet. 20) does not involve any dispute over a general federal rule on the award of prejudgment interest. Instead, the cited conflict concerns the question whether the Warsaw Convention's maximum limit on air carrier liability for accidents diminishes a court's authority to include interest in damage awards made under the Convention. The cases cited by petitioners, *Eastern Air Lines* v. *Mahfoud*, aff'd by equally divided Court, No. 83-1807 (Dec. 10, 1985) and *O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), do not purport to establish a general rule on prejudgment interest outside Warsaw Convention cases.

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[5]Petitioners misconstrue the nature of the dismissal allowances in referring to them as "backpay" (Pet. 17, 18), for the LPPs do not preclude a carrier from discharging employees. The allowances are intended to provide some compensation to furloughed employees, not to punish violations of law or Board orders.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

DOJ-1985-12